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# In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-20

VINCENT ALO, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINION BELOW

The opinion of the court of appeals (Pet. App 1a-11a) is reported at 439 F. 2d 751.

### JURISDICTION

The judgment of the court of appeals was entered on February 19, 1971. A petition for rehearing was denied on April 26, 1971. Mr. Justice Harlan extended the time for filiing a petition for a writ of certiorari to July 3, 1971, and on July 2, 1971, the petition was filed. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether petitioner was denied a speedy trial.

2. Whether wilfully and corruptly giving false and evasive answers constitutes an endeavor to obstruct the due administration of justice within the meaning of 18 U.S.C. 1505.

3. Whether the indictment was unduly vague.

## STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on two counts of obstructing the administration of federal securities laws by giving false and evasive answers during investigative proceedings conducted by the SEC. He was sentenced to concurrent terms of five years' imprisonment and fined $5,000 on each count. The court of appeals affirmed.

The facts are set forth in the opinion of the court of appeals. The owners of Scopitone, Inc., a corporation organized to exploit a combination juke box and synchronized film device, wanted to exchange shares of its stock for stock in a corporation known as Tel-A-Sign. Petitioner represented one of the major owners of Scopitone and participated in two conferences in which the owners of the two corporations attempted to settle a disagreement as to the exchange.

When Tel-A-Sign attempted to register some shares in late 1964, the Securities and Exchange Commission ordered an investigation into the matter of Tel-A-Sign's acquisition of Scopitone. The SEC suspected

that petitioner and one Gerardo Catena were undisclosed principals of Tel-A-Sign.

In May 1966, petitioner was subpoenaed by the SEC to testify in the Tel-A-Sign matter. One of the matters under inquiry was the settlement of the dispute between the stockholders of the two corporations. During the course of his testimony, which totalled about ninety minutes, petitioner pleaded a lapse of memory to 134 questions. He testified that he had attended the meetings at his principal's request, and that the meetings concerned a dispute over the distribution of some Tel-A-Sign stock, but claimed to remember virtually nothing else. He failed to recall who had arranged the meetings, how he had learned the time and location, and what had transpired at the meetings other than the fact that one group had been dissatisfied with the stock distribution.

## ARGUMENT

1. Petitioner contends that he was denied his Sixth Amendment right to a speedy trial, because the facts necessary to procure an indictment had been available to the government three years before the return of the indictment in 1969.[1] He claims further that a substantially similar sealed indictment had been returned three years earlier. This claim was neither confirmed nor denied by the government below. The case was

[1] The court of appeals noted that the additional eleven-month delay from the return of the 1969 indictment until the trial in September 1970 was due primarily to petitioner's own actions and that any governmental delay during this period was acquiesced in by petitioner (Pet. App. 8a, n. 6).

argued and decided by the court of appeals on the assumption that an indictment had been returned in 1966. Whether a sealed indictment was returned in 1966 or not, the effect on petitioner was the same. Petitioner was neither arrested, incarcerated nor publicly charged. There was no invasion of those interests which the Sixth Amendment speedy trial guarantee was designed to protect. See *United States* v. *Ewell*, 383 U.S. 116, 120. The three-year delay between the offense and the 1969 indictment is thus subject to the same considerations which apply to pre-indictment delay.

In this case, the delay would not warrant dismissal of the indictment for not only was there no prejudice shown but there was no "credible possibility" of prejudice. Since the government's case rested primarily on the recorded testimony of petitioner at the SEC hearing, there was no benefit to be gained by a prosecutorial delay. Although the memories of the other participants in the Warwick Hotel meetings might have dimmed during the period of delay, this could only have inured to the benefit of petitioner. Petitioner's contention, that since the delay was unexplained it should be presumed oppressive, finds no support in law. The Sixth Amendment speedy trial guarantee has never been a basis for dismissal of an indictment brought within the period of the statute of limitations where there was no possibility of prejudice from any pre-indictment delay.

The Court does have before it in *United States* v. *Marion*, No. 70-19, issues as to the standards to be

applied in cases of pre-indictment delay by the government. In view of the absence of any possibility of prejudice in this case, however, there is no reason to delay action on this petition pending a decision in that case. See *Kroll* v. *United States,* No. 1314, O.T. 1970, certiorari denied, May 3, 1971.

2. Petitioner contends that the giving of false and evasive answers at the SEC hearing did not "obstruct, or impede the due and proper administration of the law" within the meaning of 18 U.S.C. 1505. The court of appeals found that the "feigned forgetfulness" of petitioner came within the "plain meaning of the broad language of § 1505," which reads as follows:

> Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness in any proceeding pending before any department or agency of the United States, or in connection with any inquiry or investigation being had by either House, or any committee of either House, or any joint committee of the Congress; or
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> * * * * *
>
> Whoever corruptly, or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which such proceeding is being had before such department or agency of the United States, or the due and proper exercise of the power of inquiry under which such inquiry or investigation is being had by either House, or any committee of either House or any joint committee of the Congress—

Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

The court of appeals found no rational basis for differentiating between concealing information recorded in one's papers and concealing data in one's memory (Pet. App. 5a). The obstruction of the administration of justice is the same in either case, and the statutory language is broad enough to cover both.

We agree with petitioner that Section 1505 should be considered in conjunction with Section 1503 on which it was modelled.[2] The omnibus or "catch-all" clause of Section 1503 has been recognized as "broad enough to cover any act, committed corruptly, in an endeavor to impede or obstruct the due administration of justice." *United States* v. *Cohen,* 202 F. Supp. 587, 589 (D. Conn.); and see *Falk* v. *United States,* 370 F. 2d 472, 476 (C.A. 9), certiorari denied, *sub nom. Wendell* v. *United States,* 387 U.S. 926; *Catrino* v. *United States,* 176 F. 2d 884, 887 (C.A. 9); *United States* v. *Polakoff,* 121 F. 2d 333, 335 (C.A. 2), certiorari denied, 314 U.S. 626; *Samples* v. *United States,* 121 F. 2d 263, 265 (C.A. 5); *United States* v. *Solow,* 138 F. Supp. 812, 814–815 (S.D.N.Y.); *United States* v. *Siegel,* 152 F. Supp. 370 (S.D.N.Y.), affirmed, 263 F. 2d 530 (C.A. 2), certiorari denied, 359 U.S. 1012. Further, as pointed out in *United States* v. *Essex,* 407 F. 2d 214, 216–217, 218 (C.A. 6), one of the decisions which petitioner cites as in conflict with the

[2] See H. Rep. 1143, 76th Cong., 1st Sess.; S. Rep. 1135, 76th Cong., 1st Sess.

decision below, Section 1503 originated as a contempt statute, designed to make a crime of, and permit a jury trial for, contempts occurring beyond the presence of the court. That decision thus at least partially supports, rather than conflicts with, the decision below, for it has long been settled that although perjury alone is (as the *Essex* case holds) not sufficient to constitute a contempt by obstructing justice, a refusal to answer is. The wilful giving of answers evasive on their face, such as the claimed loss of memory here, has been deemed the equivalent of a refusal to answer, punishable as a contempt. *Richardson* v. *United States*, 273 F. 2d 144, 147–148 (C.A. 8); *Collins* v. *United States*, 269 F. 2d 745, 749–751 (C.A. 9), certorari denied, 362 U.S. 912; *Howard* v. *United States*, 182 F. 2d 908, 913–915 (C.A. 8), vacated on other grounds, 340 U.S. 898; *United States* v. *Appel*, 211 Fed. 495, 496 (S.D.N.Y.); *Life Music, Inc.* v. *Broadcast Music, Inc.*, 41 F.R.D. 16, 24 (S.D.N.Y.). Where, as here, the testimony on its face, without regard to extrinsic evidence, is clearly not a bona fide effort to answer the question, it is an endeavor to impede and obstruct the administration of justice. *In re Michael*, 326 U.S. 224, 228–229.

Such a construction of Sections 1503 and 1505 (or the contempt statute) is not a means of evading the two-witness rule for perjury, which was reaffirmed in *Weiler* v. *United States*, 323 U.S. 606. The holding here is limited to the situation where the answers are so patently evasive as to be in effect a refusal to answer. Moreover, even on a trial for perjury, it has

been held that where the falsity consists of a claimed loss of recollection, not susceptible of proof by direct testimony, circumstantial evidence alone may support a conviction. *United States* v. *Otto,* 54 F. 2d 277, 279 (C.A. 2); *Behrle* v. *United States,* 100 F. 2d 714, 715–716 (C.A.D.C.); *Fotie* v. *United States,* 137 F. 2d 831, 842 (C.A. 8).

Although two decisions of the Ninth Circuit interpreting Section 1503 evidence a more restrictive approach to language like that found in Section 1505, there is no genuine conflict between those cases and this one. In *United States* v. *Metcalf,* 435 F. 2d 754, and *Haili* v. *United States,* 260 F. 2d 744, the rule of *ejusdem generis* was not used to limit the type of act prohibited, but the type of proceeding covered. In *Metcalf* the court held that Section 1503 did not apply where there was no judicial proceeding in progress, and in *Haili* the court held that interference with probation terms was not covered. The alternative holding in *Metcalf* that Section 1503 prohibits only intimidating actions is, we submit, wrong since it ignores the use in the statute of the word "corruptly," which has almost uniformly been given a very broad meaning.

3. Petitioner claims that the 1969 indictment was unduly vague in that it did not specify the particular answers that were false or evasive. The indictment here proceeded from the general language of Section 1505 to describe the particular means employed by petitioner to obstruct and impede the due administration of justice, namely, "by giving false and evasive

answers to questions put to him as a witness in such proceeding," and specified the dates, administrative agency, proceedings and statute involved.[3]

The theory of the indictment and trial was that the impact of petitioner's entire testimony was to obstruct and impede the hearings by false and evasive answers, and not that any particular answer was perjurous. The gist of the offense of obstruction by false and evasive answers is such that the total effect of the testimony must be one of obstruction on its face. See part 2 above and *In re Michael,* 326 U.S. 224, 228–229. Although a specification as to which answers were false and evasive was not necessary (see *In re Stetser,* 44 F. Supp. 459 (D. Del.)), it was in fact provided in the bill of particulars, leaving no doubt as to the issues petitioner had to meet.

The indictment also was sufficient to protect petitioner against double jeopardy and enable him to plead former conviction in any subsequent proceed-

[3] The indictment charged in Count 1 that:

> On or about 25 May, 1966 in the Southern District of New York, Vincent Alo, a/k/a Jimmy Blue Eyes, did unlawfully wilfully, knowingly and corruptly obstruct and impede and endeavor to obstruct and impede the due and proper administration of laws of the United States, to wit, the Securities Act of 1933 and the Securities Exchange Act of 1934 as amended, under which a proceeding, to wit, an examination and private investigation entitled "In the Matter of Tel-A-Sign", before a department and agency of the United States, to wit, the Securities Exchange Commission, was then pending and being had, by giving false and evasive answers to questions put to him as a witness in such proceeding. 18 U.S.C. 1505.

Count 2 charged in the same language another violation of 18 U.S.C. 1505 on May 26, 1966.

ings. *Russell* v. *United States,* 369 U.S. 749, 763–764. Petitioner is protected against future prosecution since the specifics of the date, proceeding and agency are listed in the indictment. As noted, the false and evasive answers were indicated on a hearing transcript in answer to his request for a bill of particulars.

## CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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